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### The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in *J. McIntyre Machinery, Ltd. v. Nicastro*?

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#### Recommended Citation

63 S. C. L. Rev. 643 (2012)

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**THE CASE OF THE RETIRED JUSTICE:  
HOW WOULD JUSTICE JOHN PAUL STEVENS HAVE VOTED  
IN *J. MCINTYRE MACHINERY, LTD. v. NICASTRO*?**

Rodger D. Citron\*

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I. INTRODUCTION

Twice the Supreme Court has addressed stream of commerce jurisdiction. And twice it has been unable to articulate a rule governing personal jurisdiction

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in a stream of commerce case. In both *Asahi Metal Industry Co. v. Superior Court*<sup>1</sup> and *J. McIntyre Machinery, Ltd. v. Nicaastro*,<sup>2</sup> Justice John Paul Stevens contributed to the Court's failure to gather more than four votes for any position, and thereby to do nothing more than decide the case before it.

In 1987, when the Supreme Court decided *Asahi*, it deadlocked on the appropriate standard for minimum contacts in a stream of commerce case. Three Justices joined Justice Sandra Day O'Connor's decision requiring "something more" than the defendant's mere awareness of the stream of commerce in order to establish personal jurisdiction,<sup>3</sup> while three Justices agreed with Justice William Brennan's less demanding standard that a defendant need only be "aware that the final product is being marketed in the forum State" in order to be sued there.<sup>4</sup> Justice Stevens did not join either of those opinions. Instead, he wrote his own concurrence, thereby denying a fifth vote to either side.<sup>5</sup>

Despite its failure to articulate a rule for stream of commerce jurisdiction in *Asahi*, the Supreme Court did not revisit the standard for minimum contacts in a stream of commerce case while Justice Stevens was on the Court. After he retired in 2010 and was replaced by Justice Elena Kagan, the Court apparently saw an opportunity to resolve the conflict between the competing approaches set out by Justices O'Connor and Brennan and granted certiorari in *McIntyre*.<sup>6</sup> Although Stevens had departed, the Court nevertheless was unable to establish the legal standard for stream of commerce jurisdiction. Indeed, the Court's decisions in *McIntyre*—in which the Justices disagreed not only on the legal standard for minimum contacts but more fundamentally on the basic principles governing personal jurisdiction—were even more fragmented than its decisions in *Asahi*.<sup>7</sup>

With the benefit of hindsight, critics of *McIntyre* may blame Justice Stevens for creating the need for the Court to decide that case. After all, Stevens could have determined the legal standard in *Asahi* by voting with either Justice Brennan or Justice O'Connor. But Stevens's singular approach in *Asahi* was the

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1. 480 U.S. 102 (1987).

2. 131 S. Ct. 2780 (2011).

3. *Asahi*, 480 U.S. at 112 (O'Connor, J.).

4. *Id.* at 117 (Brennan, J., concurring).

5. *See id.* at 121–22 (Stevens, J., concurring). In his brief concurrence, Justice Stevens decided that the exercise of personal jurisdiction was not reasonable and declined to make "a constitutional determination" on the appropriate standard for minimum contacts. *Id.* As discussed later in this article, he did, however, discuss the standard for minimum contacts in dicta. *Id.* at 122; *see infra* note 148 and accompanying text.

6. *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1249 (2011) ("When the Supreme Court granted certiorari in *J. McIntyre Machinery, Ltd. v. Nicaastro*, it appeared that its purpose was to resolve the long-festering *Asahi* split." (footnote omitted)). The Court's order granting certiorari is found at 131 S. Ct. 62 (2010), and was issued on September 28, 2010, after Justice Stevens had retired. *See* Adam Liptak, *From Age of Independence to Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1 (discussing Justice Stevens's retirement and legacy).

7. *See infra* Part IV.A.

result of nothing more than his common law approach to judging. He generally decided cases narrowly, focusing on the facts of the case and avoiding constitutional determinations when possible.<sup>8</sup> This approach was consistent with his common law understanding of the judicial process, in which the law develops over time on a case-by-case basis.<sup>9</sup>

In *Asahi*, Justice Stevens declined to rule on the issue of minimum contacts in a stream of commerce case.<sup>10</sup> However, had he still been on the Court for the 2010–11 Term, Stevens would have had to address minimum contacts in *McIntyre*. How would he have voted? I believe that Stevens would have joined Justice Ruth Bader Ginsburg's dissent and also have written his own brief dissent. This Article imagines Justice Stevens's dissent in *McIntyre*. In order to engage in this exercise, it is necessary to have a more complete understanding of his approach to judging—both generally and specifically with respect to personal jurisdiction. Accordingly, this Article proceeds as follows.

Part II briefly describes Stevens's common law approach to judging. Part III provides a detailed account of the Court's decision in *Asahi*, the leading stream of commerce case prior to *McIntyre*. This discussion draws on the papers of Justices Thurgood Marshall and Harry Blackmun as well as the published decisions.<sup>11</sup> The papers illuminate an irony of *Asahi*: although the Court granted certiorari in *Asahi* to resolve a conflict in the lower courts with respect to the standard for minimum contacts in stream of commerce cases, it could reach agreement only on the application of the fair play and substantial justice factors. Lastly, Part IV sets out the dissent that I believe Stevens would have written had he participated in *McIntyre*.

## II. JUSTICE STEVENS: THE SUPREME COURT'S COMMON LAW JUDGE

President Gerald Ford nominated John Paul Stevens to the Supreme Court in 1975.<sup>12</sup> In naming a successor to Justice William O. Douglas, the President's principal concern was to put forward a well-qualified lawyer.<sup>13</sup> Stevens was a respected federal court of appeals judge on the Seventh Circuit and had previously distinguished himself as an attorney in private practice in Chicago and as a law clerk for Justice Wiley Rutledge.<sup>14</sup> With no dispute as to his

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8. See Rodger D. Citron, *The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of Justice John Paul Stevens*, 88 U. DET. MERCY L. REV. 433 (2011).

9. See *id.*

10. See *infra* Part III.D.

11. To my knowledge, no one has yet told the story of *Asahi* with the benefit of the papers of Justice Marshall and Justice Blackmun at the Library of Congress.

12. Liptak, *supra* note 6.

13. See *id.*

14. See Joseph Thai, *Stevens, John Paul*, in 4 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 469, 470 (David S. Tanenhaus ed., 2008).

qualifications and little discussion of his judicial ideology, Stevens was promptly and unanimously confirmed by the Senate.<sup>15</sup>

Justice Stevens served from 1975 until 2010.<sup>16</sup> In his many decisions and occasional writings, Stevens generally acted in the manner of the quintessential common law judge.<sup>17</sup> This common law approach was defined by several related qualities. First, Stevens decided cases narrowly, with an emphasis on the particular facts of a case.<sup>18</sup> Stevens's commitment to "deliberation focused on the facts of the particular case" served to restrain "the breadth of [his] judicial decision[s]."<sup>19</sup> Most importantly, Stevens's approach was consistent with the common law notion that the law develops over time on a case-by-case basis.<sup>20</sup> For a common law judge, courts may and should develop the law by continuously deciding cases that present new facts and circumstances that require the application of familiar legal rules, and occasionally, the development of new legal principles.<sup>21</sup>

In addition to generally adhering to the common law approach of case-by-case deliberation, Justice Stevens's judicial approach was characterized by his understanding of judicial restraint. Although Stevens did not shy away from exercising judicial power, he nevertheless employed it in moderation, often deferring to other legal decision-makers.<sup>22</sup> For Stevens, the common law process for the development of constitutional doctrine not only counseled against overbroad holdings in favor of more gradual development of the law, it also informed his reluctance to adjudicate constitutional issues when the case could be decided on other grounds.<sup>23</sup>

It is important to note that these different qualities—commitment to deciding cases narrowly with an emphasis on the facts of the case, faith in the development of the law through the common law approach to deciding cases,

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15. *See id.*; *see also* Liptak, *supra* note 6.

16. *See* Liptak, *supra* note 6.

17. *See* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1090.

18. *Id.*; *see also* Citron, *supra* note 8, at 436–37.

19. Popkin, *supra* note 17, at 1091.

20. *See id.* at 1091, 1094; *see also* Thai, *supra* note 14, at 470 ("Stevens's approach falls within a common-law tradition of judicial restraint, whereby judges develop the law slowly and cautiously over the course of many cases."). *See generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–6 (1949) (describing the common law system).

21. *See* Popkin, *supra* note 17, at 1094; John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 180 (1982) ("[O]ur common law heritage and the repeated need to add new stitches in the open fabric of our statutory and constitutional law foreclose the suggestion that judges never make law.").

22. *See* Thai, *supra* note 14, at 471 ("This practice of deciding no more than necessary displays not only Stevens's judicial restraint and pragmatism, but also exhibits Stevens's respect for the coordinate role of the other branches of government in the U.S. constitutional system."); Citron, *supra* note 8, at 438 (citing Popkin, *supra* note 17, at 1090).

23. *See* Stevens, *supra* note 21, at 180 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring)) (noting that the doctrine of judicial restraint "teaches judges to avoid unnecessary lawmaking"); Popkin, *supra* note 17, at 1096.

and belief in judicial restraint—were related to and in fact reinforced each other. A judicial decision that is narrowly limited to its facts results in the articulation of a more specific and less general rule. Such a decision also allows for lawmakers, including courts, to modify or develop the rule depending upon the facts and circumstances of the next case.<sup>24</sup>

Justice Stevens applied his common law approach to the Supreme Court's personal jurisdiction decisions from 1977 through 1991.<sup>25</sup> For example, in the first decision from this period, the Court substantially restricted the availability of quasi in rem jurisdiction in *Shaffer v. Heitner*.<sup>26</sup> In a scholarly decision written by Justice Thurgood Marshall, the Court held that assertions of personal jurisdiction based upon property should be analyzed according to the fairness approach set out in *International Shoe*.<sup>27</sup> Although Stevens agreed with the judgment arrived at by the Court, he declined to join the Court's opinion because he believed it was too broad.<sup>28</sup> Instead, he wrote a separate concurrence in which he sought to preserve "quasi in rem jurisdiction where real estate is involved,"<sup>29</sup> and analyzed Delaware's attempt to exercise jurisdiction based upon the specific—and unique—aspects of its laws with respect to stock ownership.<sup>30</sup>

Justice Stevens reasoned that the Due Process Clause protects against "judgments without notice."<sup>31</sup> He explained that for nonresident defendants, notice may come in the form of "fair notice," defined as fair warning that the defendant's activity may subject him to the jurisdiction of the state.<sup>32</sup> With respect to the defendants in *Shaffer*—who were corporate directors and officers of Greyhound sued in a derivative suit and haled into Delaware if they owned Greyhound stock<sup>33</sup>—Stevens asserted that their purchase of securities on the open market did not provide fair notice of Delaware's power to exercise jurisdiction.<sup>34</sup>

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24. See Popkin, *supra* note 17, at 1091 (noting that "[j]udicial deference to other institutions preserves the Court's time and political capital to implement" the objective of "deliberation about the facts of a particular case").

25. From 1977 through 1991, the Supreme Court decided a dozen or so cases addressing personal jurisdiction doctrine. See Citron, *supra* note 8 (collecting cases). *The Last Common Law Justice* article provides a comprehensive account of Justice Stevens's written decisions in those cases. This Article discusses only those cases relevant to understanding how Justice Stevens voted in *Asahi* and how, in my view, he would have voted in *McIntyre*.

26. 433 U.S. 186 (1977).

27. *Id.* at 212.

28. *Id.* at 219 (Stevens, J., concurring).

29. *Id.*

30. *Id.* at 218–19.

31. *Id.* at 217 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324 (1945)) (internal quotation marks omitted).

32. *Id.* at 218.

33. *Id.* at 189–93 (majority opinion).

34. *Id.* at 218 (Stevens, J., concurring). Furthermore, Justice Stevens wrote that the Delaware sequestration statute created "an unacceptable risk of judgment without notice" because Delaware was the only state that considered stock to be located in the corporation's state of incorporation, even though the actual certificates and owner were not kept within the state. *Id.*

Justice Stevens's concurrence in *Shaffer* focused on fair notice, a principle that approximated the concept of minimum contacts set out in *International Shoe*. Several years after its decision in *Shaffer*, the Supreme Court established that the first part (or prong) of analyzing the constitutionality of any exercise of personal jurisdiction would be to evaluate the nonresident defendant's minimum contacts in the forum state.<sup>35</sup> The second part (or prong) would be to analyze whether the exercise of personal jurisdiction was reasonable—more specifically, whether it comported with principles of “fair play and substantial justice.”<sup>36</sup>

In *Burger King Corp. v. Rudzewicz*, the Supreme Court upheld the exercise of personal jurisdiction in a decision that discussed the relationship between minimum contacts and fair play and substantial justice.<sup>37</sup> Justice Stevens dissented because he believed the exercise of personal jurisdiction was not fair.<sup>38</sup> For Justice Stevens, *Burger King* involved the intersection of contract law principles and personal jurisdiction rules.<sup>39</sup> Because contract law invites consideration of the balance of power between the parties, Justice Stevens believed it authorized the Court to examine the fairness of the transaction between the parties.<sup>40</sup>

In *Burger King*, the Court held that Florida could exercise personal jurisdiction over a franchisee that operated only in Michigan because of its extensive dealings with the more powerful franchisor, which was incorporated in Florida.<sup>41</sup> In dissent, Justice Stevens argued that it would not be fair for Burger King, the franchisor, to be able to hale the franchisee out of its home state where its business operated.<sup>42</sup> His opinion emphasized the disparity in power between the parties and focused on the facts of that particular case.<sup>43</sup>

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35. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (citing *Int'l Shoe*, 326 U.S. at 316).

36. *Id.* at 292 (quoting *Int'l Shoe*, 326 U.S. at 316) (internal quotation marks omitted). Although the Court discussed the concepts of “minimum contacts” and “fair play and substantial justice” in *World-Wide Volkswagen*, it did not divide the concepts into a two-part (or prong) test until *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). See *id.* at 474–77 (citing *Int'l Shoe*, 326 U.S. at 316, 320).

37. *Id.* at 476–77, 487 (citing *World-Wide*, 444 U.S. at 292; *Int'l Shoe*, 326 U.S. at 320).

38. *Id.* at 487, 490 (Stevens, J., dissenting) (citing *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1513 (11th Cir. 1984), *rev'd and remanded sub nom. Burger King*, 471 U.S. 462). *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), is another case in which Justice Stevens's emphasis on fairness led him to dissent. See *id.* at 597–605 (Stevens, J., dissenting). I summarize the Court's majority opinion and Justice Stevens's dissenting opinion in *Carnival Cruise* in Citron, *supra* note 8, at 459–64. In this Article, however, my discussion of *Carnival Cruise* is limited to this footnote because it was decided after *Asahi* and did not involve the constitutional analysis of minimum contacts and fair play and substantial justice. In *Carnival Cruise*, the Court enforced a forum-selection clause contained in a passenger's cruise line ticket, despite objections based on contract and statutory law. See *id.* (citations omitted).

39. See *Burger King*, 471 U.S. at 487–88 (Stevens, J., dissenting).

40. See *id.* at 489–90 (citing *MacShara*, 724 F.2d at 1512–13).

41. *Id.* at 464, 466–68, 482, 487 (majority opinion).

42. *Id.* at 487–88 (Stevens, J., dissenting).

43. *Id.*

Justice Stevens expressed concern about the potential for unfairness in negotiations between franchisors and franchisees, in which the franchisor typically is dominant.<sup>44</sup> In this discussion, Stevens focused on the relative strength of the parties rather than the sophistication of Rudzewicz, the franchisee.<sup>45</sup> Writing for the Court, Justice Brennan cited Rudzewicz's representation by counsel and background as an accountant, as well as the length of the negotiations between the parties.<sup>46</sup> Stevens, however, viewed the relationship between a national franchisor and a local franchisee as embodying a "characteristic disparity of bargaining power" demonstrated by the facts that Rudzewicz had little latitude in negotiations, the final terms were considerably less favorable than were originally contemplated, and Burger King refused to make any price concessions.<sup>47</sup> As discussed in the next Part, Stevens's common law approach to personal jurisdiction doctrine was evident in *Asahi*,<sup>48</sup> the next personal jurisdiction case decided by the Supreme Court after *Burger King*.

### III. A MORE COMPLETE ACCOUNT OF *ASAHI*

#### A. *Prelude: World-Wide Volkswagen Corp. v. Woodson*

In 1980, the Supreme Court articulated its most comprehensive decision to date on specific personal jurisdiction in the context of products liability lawsuits in *World-Wide Volkswagen Corp. v. Woodson*.<sup>49</sup> The case involved an automobile accident that occurred in Oklahoma, which is also where the plaintiffs sued the defendants asserting claims sounding in tort.<sup>50</sup> Specifically, the plaintiffs claimed "that their injuries resulted from [the] defective design and placement of the [car's] gas tank and fuel system."<sup>51</sup> The Court found that

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44. *Id.* at 489 (citing *MacShara*, 724 F.2d at 1512).

45. *Id.* at 489–90 (citing *MacShara*, 724 F.2d at 1512).

46. *Id.* at 485 (majority opinion) (citing *MacShara*, 724 F.2d at 1514 (Johnson, J., dissenting)).

47. *Id.* at 489–90 (Stevens, J., dissenting) (quoting *MacShara*, 724 F.2d at 1512–13) (internal quotation marks omitted). Although Rudzewicz's franchise was a local business, it nevertheless had extensive dealings with the Burger King corporation in Florida. *See id.* at 480–81 (majority opinion). Therefore, Justice Stevens did not emphasize the lack of fair notice, a principle he set out in *Shaffer*. *Shaffer v. Heitner*, 433 U.S. 186, 217–19 (1977) (Stevens, J., concurring) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324 (1945)). Instead, his opinion was based on the unfairness of haling the local franchisee from its home state to the forum state of the more powerful franchisor. *See Burger King*, 471 U.S. at 489 (Stevens, J., dissenting) (quoting *MacShara*, 724 F.2d at 1511–13).

48. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

49. 444 U.S. 286 (1980).

50. *Id.* at 288.

51. *Id.* The plaintiff was the Robinson family, which included the mother Kay, the father Harry, and their two children who sued through their father. *Id.* at 288 n.2. The defendants were "the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer, Volkswagen of America, Inc. (Volkswagen); its regional distributor, . . . World-Wide Volkswagen Corp. (World-Wide); and its retail dealer, . . . Seaway." *Id.* at 288.



neither the retail seller of the car, which was located in New York, nor its regional distributor, which did business in the Northeast, attempted to conduct operations or do business in Oklahoma.<sup>52</sup> The Court, therefore, held that neither defendant purposefully availed itself of the Oklahoma market and could not be haled into court in the forum state.<sup>53</sup>

*World-Wide Volkswagen* was the Court's most detailed discussion to date of the notion of purposeful availment, and it provided an important refinement to the approach of analyzing personal jurisdiction over nonresident defendants set out in *International Shoe*.<sup>54</sup> With respect to purposeful availment, the Court stated:

[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.<sup>55</sup>

After *World-Wide Volkswagen*, lower courts adopted conflicting approaches to determining whether this "stream of commerce" theory of personal jurisdiction applied to the manufacturer of a component part of a defective

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52. See *id.* at 288–89, 295.

53. See *id.* at 297–99.

54. In addition, the Supreme Court in *World-Wide Volkswagen* set out for the first time the five factors to evaluate to determine whether "traditional notions of fair play and substantial justice" have been "offend[ed]" by the exercise of personal jurisdiction. 444 U.S. at 292 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted). As the citations in the relevant paragraph of the Court's decision demonstrate, the different factors had been set out in previous cases. See *id.* *World-Wide Volkswagen* represents the first case in which the Court listed all of the factors and presented them as part of the fair play and substantial justice inquiry. See Citron, *supra* note 8, at 448 n.81. However, because the Court concluded that the defendants had not purposefully availed themselves of the forum state, the Court did not analyze the five factors it set out. See *World-Wide Volkswagen*, 444 U.S. at 295–99.

55. *Id.* at 297–98 (citing for analogous support *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)). In *Gray*, the Illinois Supreme Court upheld the exercise of personal jurisdiction over the manufacturer of a component part on the basis of the stream of commerce doctrine. *Gray*, 176 N.E.2d at 766–77; see also Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 229 & n.17 (1967) (citing *Gray* as one of a "flood of cases in which suppliers of goods were subjected to the power of the states in which defects in their merchandise took harmful effect").

product.<sup>56</sup> In 1986, the Court granted certiorari in *Asahi Metal Industry Co. v. Superior Court* to resolve this conflict.<sup>57</sup>

## B. *Asahi at the Supreme Court*

### 1. *The Petition for Certiorari*

The accident giving rise to *Asahi* occurred in 1978, when two California residents were involved in a motorcycle accident on a highway in California.<sup>58</sup> One person was killed and the other was severely injured.<sup>59</sup> The injured person filed a products liability lawsuit against a number of defendants in California state court, asserting that the motorcycle tire, tube, and sealant were defective.<sup>60</sup> One of the defendants was Cheng Shin Rubber Industrial Company (Cheng Shin), a tire tube manufacturer in Taiwan that sold its products in the United States, and specifically in California.<sup>61</sup> Subsequently, Cheng Shin filed a cross-claim against its codefendants and a third-party claim against a number of parties, including Asahi Metal Industry Co., Ltd. (Asahi), a Japanese company that manufactured the tube valve assembly used in Asahi's tire tubes.<sup>62</sup> Cheng Shin asserted claims for indemnification.<sup>63</sup>

56. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 110 (1987) (noting different approaches taken by lower courts). Compare, e.g., *Nelson by Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1126–27 (7th Cir. 1983) (endorsing stream of commerce theory to allow personal jurisdiction over purchasing agent and manufacturer), with *Humble v. Toyota Motor Co.*, 727 F.2d 709, 711 (8th Cir. 1984) (per curiam) (citing *Humble v. Toyota Motor Co.*, 578 F. Supp. 530, 533 (N.D. Iowa 1982) (declining to exercise personal jurisdiction over foreign car seat manufacturer whose products were placed into the American stream of commerce by someone other than the seat manufacturer). Both cases are discussed in Justice Byron White's draft dissent from the denial of certiorari in *Asahi*, which never was published. See 2d Draft Dissent of Justice White at 2–3, *Asahi Metal Indus. Co. v. Superior Court*, No. 85–693 (Feb. 27, 1986) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465) [hereinafter 2d Draft Dissent from Denial of Certiorari].

57. 475 U.S. 1044 (1986) (granting certiorari).

58. *Asahi*, 480 U.S. at 105.

59. *Id.*

60. *Id.* at 105–06.

61. *Id.* at 106 (“Cheng Shin alleged that approximately 20 percent of its sales in the United States [were] in California.”).

62. *Id.*; see also 2d Draft Dissent from Denial of Certiorari, *supra* note 56, at 1 (Asahi did business with Cheng Shin for more than a decade and “[b]etween 1978 and 1982, Asahi sold 1.35 million valve assemblies to Cheng Shin. This accounted for between .44 percent and 1.24 percent of Asahi's total income for those years.”).

To be clear, the plaintiff did not name Asahi as a defendant in its original lawsuit. See *Asahi*, 480 U.S. at 105–06. Eventually the plaintiff settled its claims against all of the defendants named in its complaint and its lawsuit was dismissed. *Id.* at 106; see also 2d Draft Dissent from Denial of Certiorari, *supra* note 56, at 1–2. See generally Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. REV. 729, 783–87 (1988) (providing a detailed discussion of the litigation in the California courts).

63. *Asahi*, 480 U.S. at 106.

Asahi was served with Cheng Shin's complaint in Japan.<sup>64</sup> Asahi moved to quash service of the summons, essentially arguing that it did not have any contact with California other than the fact that its tube valves were used in finished products by other manufacturers who did business and sold their products in California (as Cheng Shin had done).<sup>65</sup> The California Superior Court denied Asahi's motion to quash.<sup>66</sup> Asahi sought review of the trial court's decision in the California Court of Appeals, which issued a writ of mandate ordering the trial court to grant Asahi's motion to quash.<sup>67</sup> The plaintiffs filed a petition for hearing to challenge this decision in the California Supreme Court, which reversed the court of appeals and upheld the exercise of jurisdiction over Asahi.<sup>68</sup>

Asahi filed a petition for certiorari to the Supreme Court during the 1985–86 Term.<sup>69</sup> Asahi contended that the California Supreme Court's decision was inconsistent with *World-Wide Volkswagen* and conflicted with at least two federal courts of appeals' decisions applying the stream of commerce doctrine.<sup>70</sup> Cheng Shin, the respondent and real party in interest, argued that the California Supreme Court's decision correctly applied *World-Wide Volkswagen* and arrived at a fair and reasonable result.<sup>71</sup> Furthermore, Cheng Shin emphasized that personal jurisdiction determinations were fact-specific and therefore contended that there was no real conflict to be resolved with respect to the legal analysis applied in such cases.<sup>72</sup>

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64. 2d Draft Dissent from Denial of Certiorari, *supra* note 56, at 2.

65. *See Asahi*, 480 U.S. at 106–07.

66. *See Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 545 (Cal. 1985), *rev'd*, 480 U.S. 102 (1987).

67. *See Asahi*, 480 U.S. at 107.

68. *See Asahi*, 702 P.2d at 545, 553. *See also* 2d Draft Dissent from Denial of Certiorari, *supra* note 56, at 2; Stravitz, *supra* note 62, at 785–87.

69. Petition for Writ of Certiorari to the Supreme Court of the State of California, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (No. 85-693) [hereinafter *Petition for Certiorari*] (on file with author).

70. *See id.* at 4–6, 15–18 (citations omitted); *see also* Schultz, Preliminary Memorandum at 5–6, *Asahi Metal Indus. Co. v. Superior Court*, No. 85–693 (Jan. 2, 1986) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465) [hereinafter *Preliminary Memorandum*] (citing *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3rd Cir. 1981); *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984)) (“The Cal. Sup. Ct.’s decision is also inconsistent with the decisions of other courts which have applied the stream of commerce theory to component part manufacturers.”). This memorandum was written by Andrew Schultz, who was a law clerk for Justice Byron White during the term when the certiorari petition was filed. *See Andrew G. Schultz*, RODEY LAW, [http://www.rodey.com/pg\\_attorney.html?a=aschultz](http://www.rodey.com/pg_attorney.html?a=aschultz) (last visited Apr. 4, 2012).

71. *See* Response to Petition for Writ of Certiorari to the Supreme Court of the State of California at 5–13, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (No. 85-693) [hereinafter *Respondent’s Opposition*] (on file with author); Preliminary Memorandum, *supra* note 70, at 6–7.

72. *See* Respondent’s Opposition, *supra* note 71, at 15–18; Preliminary Memorandum, *supra* note 70, at 6–7.

The Court apparently considered the petition for certiorari in conference on January 17, 1986.<sup>73</sup> A preliminary memorandum from a law clerk—what is known as a “cert. pool memo”<sup>74</sup>—noted a “clear conflict among the federal [circuit] courts of appeal” with respect to how *World-Wide Volkswagen* applied to manufacturers of component parts such as Asahi and recommended that the Court grant the petition.<sup>75</sup> Justice Harry Blackmun’s law clerk recommended that Blackmun vote against granting certiorari. At the bottom and on the back of the last page of the preliminary memorandum, there is a handwritten note analyzing the relevant authorities that concluded: “Since Cal. Sct’s opinion is in accord with the majority view (and to me seems correct) I think cert should be denied. The conflicting cases are not precisely the same. And I agree with resp. that in this area, the questions are very factually based.”<sup>76</sup>

## 2. *The Initial Conference Vote*

Neither the Marshall nor the Blackmun papers show exactly how each Justice voted at the conference, but it appears that fewer than four Justices initially voted to grant certiorari. On February 25, Justice Byron White circulated a draft dissent from the denial of certiorari, and two days later Justice Lewis Powell indicated that he would join White’s dissent.<sup>77</sup> In his draft dissent, White quoted the critical passage from *World-Wide Volkswagen* set out above and noted that “[s]ince that observation, a clear conflict among the lower courts has developed concerning how this ‘stream of commerce’ theory of personal jurisdiction is to be applied to a component part manufacturer.”<sup>78</sup> Therefore, he recommended granting the petition.<sup>79</sup> Subsequently, on March 3, 1986, the Court granted certiorari.<sup>80</sup>

The parties briefed the case<sup>81</sup> and oral argument was held on November 5, 1986.<sup>82</sup> Two days later, the Justices met in conference to vote.<sup>83</sup> Justice

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73. Preliminary Memorandum, *supra* note 70, at 1.

74. See Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889, 894 (2004).

75. Preliminary Memorandum, *supra* note 70, at 8–9.

76. *Id.* at 9–add. The handwritten note is signed “HM” on January 12, 1986. *Id.* HM was Helane Morrison, one of Justice Blackmun’s law clerks for the 1985–86 Term. *Corporate*, HALL CAPITAL (Feb. 17, 2012, 5:31 PM), <http://www.hallcapital.com/team/corporate/helane-l-morrison.php>.

77. See 2d Draft Dissent from Denial of Certiorari, *supra* note 56, at 1.

78. *Id.* at 3.

79. *Id.* at 4.

80. *Asahi Metal Indus. Co. v. Superior Court*, 475 U.S. 1044 (1986) (granting certiorari).

81. In its opening merits brief, Asahi argued that under *World-Wide Volkswagen*, “application of the ‘stream of commerce’ theory” did not authorize “California to assert jurisdiction over” the Japanese company. Petitioner’s Brief at 7, *Asahi*, 480 U.S. 102 (No. 85-693), 1986 WL 727585 at \*7. In addition, Asahi contended that “[e]ven if sufficient minimum contacts existed,” *id.*, “[t]he assertion of . . . jurisdiction [did] not accord Asahi fair play and substantial justice” given “the burden upon the defendant, the opportunity of the Far Eastern plaintiff to sue in its own

Blackmun's papers include a two-page chart for the case that indicates the position of each Justice at the conference.<sup>84</sup> The chart lists the name of each Justice and in small handwriting includes brief notes about each Justice's views.<sup>85</sup> Chief Justice William Rehnquist and Justices Blackmun, Powell, O'Connor, and Antonin Scalia apparently voted to reverse the California Supreme Court.<sup>86</sup> Justices White, Marshall, and Stevens appear to have voted to affirm.<sup>87</sup> And Justice William Brennan apparently wanted to dismiss the writ of certiorari as improvidently granted based upon the notation of "DIG" next to his name on the chart.<sup>88</sup>

### 3. Justice O'Connor's First Draft of the Opinion of the Court

Justice O'Connor was assigned to write the Opinion of the Court and circulated a first draft on December 15, 1986.<sup>89</sup> This draft had the same structure

hemisphere, and the inappropriateness of applying California law or choosing a California court to administer Far Eastern law," *id.* at 8.

In its brief, respondent Cheng Shin contended that "Asahi's conduct satisfies minimum contact requirements" because the company "had knowledge that Cheng Shin was incorporating Asahi's valve into its own product and selling the product to California." Respondent's Brief at 5, *Asahi*, 480 U.S. 102 (No. 85-693), 1986 WL 727589 at \*5. Noting that "[t]wenty percent of the Cheng Shin tire valves sold in the United States were destined for California," and that "[o]ver a five year period, Asahi sold 1.35 million valves to Cheng Shin," Cheng Shin argued that Asahi had availed itself of the state of California because "Asahi knowingly benefited economically from the systematic and continued sales of its component parts in California" by Cheng Shin and other manufacturers who marketed their products "worldwide." *Id.*

82. *Asahi Metal Industry Co. v. Superior Court*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW (Feb. 17, 2012), [http://www.oyez.org/cases/1980-1989/1986/1986\\_85\\_693](http://www.oyez.org/cases/1980-1989/1986/1986_85_693) (audio of oral argument).

83. See Chart of Justices, *Asahi Metal Indus. Co. v. Superior Court*, No. 85-693 (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465) [hereinafter Chart].

84. See *id.*

85. See *id.*

86. See *id.* There is a minus sign ("-") next to the names of these five justices. According to a subsequent memo written by his law clerk, Blackmun believed that the California Supreme Court should be reversed because "jurisdiction [did] not comport with 'fair play and substantial justice'"—the second prong of the Court's analysis of personal jurisdiction set out in *World-Wide Volkswagen*. Memorandum from Ellen, Law Clerk, Supreme Court of U.S., to Justice Blackmun, Assoc. Justice, Supreme Court of the U.S. 1 (Jan. 15, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465). The memorandum was written by Ellen Deason, one of Justice Blackmun's law clerks for the 1986–87 Term. *Ellen E. Deason*, THE OHIO STATE UNIVERSITY (Feb. 17, 2012 5:36 PM), <http://moritzlaw.osu.edu/faculty/bios.php?ID=17>.

87. See Chart, *supra* note 83, at 1–2 (showing a plus sign "+" next to the names of these three Justices).

88. See *id.* at 1.

89. See 1st Draft Opinion of the Court at 1, *Asahi Metal Indus. Co. v. Superior Court*, No. 85-693 (Dec. 15, 1986) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465) [hereinafter Justice O'Connor 1st Draft].

and contained most of the same text as her final opinion. In order to highlight the changes made before the decision was finalized, I briefly summarize the draft here.

Justice O'Connor began with a paragraph setting out the question presented:

This case presents the question whether the mere awareness on the part of an foreign defendant that the components it manufactured, sold and delivered outside the United States would reach the forum state in the stream of commerce . . . such that the exercise of jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’”<sup>90</sup>

Part I of the opinion set out the facts of the motorcycle accident and the procedural history of the litigation in the California courts.<sup>91</sup>

Part II of the draft opinion had two parts. In Part II-A, Justice O'Connor provided the minimum contacts analysis, which concluded that “something more than that the defendant was aware of its product’s entry into the forum state through the stream of commerce” was required “in order for the state to exert jurisdiction over the defendant.”<sup>92</sup> According to O'Connor, the facts established that Asahi did not attempt to purposefully avail itself of the California market, and, therefore, California’s exercise of personal jurisdiction over the company exceeded the limits of due process.<sup>93</sup>

Although Justice O'Connor held that Asahi did not have sufficient minimum contacts with California (and could have concluded her analysis with this holding<sup>94</sup>), she nevertheless proceeded to analyze the fair play and substantial justice factors set out in *World-Wide Volkswagen*.<sup>95</sup> Her discussion “of the reasonableness of the exercise of jurisdiction” included a lengthy quotation from that case that began: “[T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors . . . .”<sup>96</sup> O'Connor then analyzed the factors, noting the “severe” burden

90. *Id.* Justice O'Connor included the citation “*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463” at the end of this sentence. *Id.* In her published decision, she changed “an” to “a” and added the year—(1940)—to the *Milliken v. Meyer* citation, but otherwise did not make any other changes to this paragraph. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987).

91. Justice O'Connor 1st Draft, *supra* note 89, at 1–4.

92. *Id.* at 7.

93. *Id.* at 8–9. The text of this discussion in the first draft is identical to the discussion in her published decision. *Asahi*, 480 U.S. at 112–13.

94. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 295 (1980) (articulating, but not applying, the fair play and substantial justice factors after concluding that the defendants did not purposefully avail themselves of the forum state).

95. Justice O'Connor 1st Draft, *supra* note 89, at 9–12 (citing *World-Wide Volkswagen*, 444 U.S. at 292).

96. *Id.* at 9 (alteration in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (internal quotation marks omitted). As discussed below, O'Connor revised this text after corresponding with Justice Brennan about the draft opinion.

on Asahi, the “slight” interests “of the plaintiff and the forum in California’s assertion of jurisdiction over Asahi,” and the need “to consider the procedural and substantive policies of other *nations*” when evaluating “the interests of the ‘several States’ . . . in the efficient judicial resolution of the dispute and the advancement of substantive policies.”<sup>97</sup> She concluded that California’s exercise of personal jurisdiction over Asahi was unreasonable and unfair.<sup>98</sup>

With respect to the forum state’s interest in the dispute, Justice O’Connor wrote:

With the departure of California resident Zurcher from the litigation, California’s legitimate interests in the dispute have considerably diminished. The Supreme Court of the State of California argued that the State had an interest in “protecting its consumers by ensuring that foreign manufacturers comply with the state’s safety standards.” The state supreme court’s definition of California’s interest, however, was overly broad. The dispute between Cheng Shin and Asahi [was] primarily about indemnification rather than safety standards.<sup>99</sup>

In the rest of the paragraph, Justice O’Connor noted that it was not clear whether California law would govern an indemnification dispute between two foreign companies over the foreign sale and shipment of goods.<sup>100</sup> Finally, she acknowledged that there was a deterrent value associated with the prospect of being sued in California, but nevertheless concluded that “similar [deterrent] pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.”<sup>101</sup>

#### 4. *Justice Stevens’s Draft Concurrence*

On December 19, 1986, four days after Justice O’Connor circulated her first draft to the Court, Justice Stevens circulated the first draft of his decision.<sup>102</sup> In a

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97. *Id.* at 10–11; *see Asahi*, 480 U.S. at 114–15.

98. Justice O’Connor 1st Draft, *supra* note 89, at 12 (“Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum state, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.”); *see also Asahi*, 480 U.S. at 116 (showing identical text, except “state” was changed to “State” in the published decision).

99. Justice O’Connor 1st Draft, *supra* note 89, at 10–11 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 553 (Cal. 1985), *rev’d*, 480 U.S. 102).

100. *Id.* at 11 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

101. *Id.* *See also Asahi*, 480 U.S. at 115.

102. 1st Draft Opinion of Justice Stevens at 1, *Asahi Metal Indus. Co. v. Superior Court*, No. 85-693 (Dec. 19, 1986) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

brief opinion, Stevens concurred in the judgment but declined to join Part II-A of O'Connor's decision on minimum contacts in a stream of commerce case.<sup>103</sup> He explained that it was not "necessary" for the Court to do "[a]n examination of minimum contacts" because analysis of "the factors set forth in *World-Wide Volkswagen*" established that "California's exercise of jurisdiction over Asahi in this case would be 'unreasonable and unfair.'"<sup>104</sup>

Then, in dicta, Justice Stevens argued that Justice O'Connor had misapplied her more demanding test for purposeful availment to the facts.<sup>105</sup> He explained that "[o]ver the course of its dealings with Cheng Shin, Asahi ha[d] arguably engaged in a higher quantum of conduct than '[t]he placement of a product into the stream of commerce, without more.'"<sup>106</sup> Stevens concluded, "In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world."<sup>107</sup>

### 5. *The Initial Votes of Justices Scalia and Blackmun*

On the same day, Justice Scalia informed Justice O'Connor that he too would concur in her decision.<sup>108</sup> He began his memorandum by noting that he agreed with Justice Stevens "that we should not decide more issues than are needed per case."<sup>109</sup> However, he continued, "it seems to me preferable to decide the point addressed in Part II-A of your opinion, rather than the point John prefers, addressed in Part II-B."<sup>110</sup> Scalia explained that Part II-A, on minimum contacts, "is no more than an application of *Worldwide Volkswagen* [sic]," while Part II-B, on fair play and substantial justice, "elevates to an alternate holding the dicta in *Burger King*, *Keeton*, and *Calder*—dicta that I am not sure I agree with."<sup>111</sup>

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103. *See id.* The text of Justice Stevens's first draft is virtually identical to the text of his published decision except for stylistic edits. *Compare id.* at 1–2, with *Asahi*, 480 U.S. at 121–22 (Stevens, J., concurring).

104. *Asahi*, 480 U.S. at 121–22 (Stevens, J., concurring) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

105. *Id.* at 122.

106. *Id.*

107. *Id.*

108. *See* Memorandum from Antonin Scalia, Assoc. Justice, Supreme Court of the U.S., to Sandra Day O'Connor, Assoc. Justice, Supreme Court of the U.S. (Dec. 19, 1986) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

109. *Id.*

110. *Id.*

111. *Id.*



On December 30, 1986, Justice Blackmun informed Justice O'Connor that he would not join Part II-A of her opinion.<sup>112</sup> He noted that, "We seem to be somewhat all over the lot in this case. I am about where John and Byron are . . . [and] would decide the case on the basis of fairness rather than on the minimum contacts issue."<sup>113</sup> His memorandum concluded: "For now, I shall wait to see what Bill Brennan writes."<sup>114</sup>

#### 6. Justice Brennan's First Draft

Justice Brennan weighed in about two weeks later on January 15, 1987.<sup>115</sup> In his first draft, he concurred in the judgment and wrote on both parts of the Court's analysis.<sup>116</sup> In Part I, Brennan argued for a less demanding standard for minimum contacts in a stream of commerce case.<sup>117</sup> In his view, "As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."<sup>118</sup> Brennan explained that this standard followed from the Court's decision in *World-Wide Volkswagen*.<sup>119</sup> He then concluded that "the facts found by the California Supreme Court support its finding of minimum contacts."<sup>120</sup>

In Part II of his first draft, Justice Brennan addressed the fair play and substantial justice factors.<sup>121</sup> Initially, he disagreed with Justice O'Connor's assertion that when evaluating those factors "the burden on the defendant must be the primary concern,"<sup>122</sup> and reiterated his view, set out in his *World-Wide Volkswagen* dissent, that "the 'interests of the forum State and other

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112. Memorandum from Harry A. Blackmun, Assoc. Justice, Supreme Court of the U.S., to Sandra Day O'Connor, Assoc. Justice, Supreme Court of the U.S. (Dec. 30, 1986) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

113. *Id.*

114. *Id.*

115. 1st Draft Opinion of Justice Brennan at 1, *Asahi Metal Indus. Co. v. Superior Court*, No. 85-693 (Jan. 15, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465) [hereinafter Brennan 1st Draft].

116. *See id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

117. *See id.* at 1-2.

118. *Id.* at 2. *See also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring) (noting the same).

119. *See Brennan 1st Draft, supra* note 115, at 2-5. *See also Asahi*, 480 U.S. at 117-20 (Brennan, J., concurring) (same). The text of Part I of Brennan's first draft is essentially the same as the text of his final published decision.

120. Brennan 1st Draft, *supra* note 115, at 5. "I cannot join the Court's determination that Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California is insufficient to establish minimum contacts with California." *Id.* at 6. *See also Asahi*, 480 U.S. at 121 (same).

121. Brennan 1st Draft, *supra* note 115, at 6 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985); *Int'l Shoe*, 326 U.S. at 320).

122. *Id.* at 6 (quoting Justice O'Connor 1st Draft, *supra* note 89, at 1) (internal quotation marks omitted).

parties . . . are entitled to as much weight as are the interests of the defendant.”<sup>123</sup>

Justice Brennan then weighed the various factors.<sup>124</sup> He did not discuss—and therefore did not dispute—Justice O’Connor’s conclusion that the burden on Asahi, the defendant, was severe. Brennan observed that “the interests of the State and of the plaintiff are modest.”<sup>125</sup> As to the former, he explained that although “[t]he State has an interest in apportioning the liability between foreign manufacturers,” that interest was relevant only if California law applied—and he believed that “it is uncertain whether it would.”<sup>126</sup> Additionally, Brennan noted that the “interests of the State must also be viewed in light of the considerations of international comity that the Court identifies.”<sup>127</sup> Because he agreed with O’Connor’s decision with respect to the fair play and substantial justice factors, Brennan concurred in the judgment of the Court.<sup>128</sup>

#### 7. *Justices Brennan and O’Connor Agree to Agree on Fair Play and Substantial Justice*

On the same day that Justice Brennan circulated his first draft, Justice O’Connor sent a brief response in which she stated, “It appears that we are not far apart with regard to” fair play and substantial justice.<sup>129</sup> “Indeed,” she continued, “the only major point of departure appears to be your disagreement with my reference to the notation in *World-Wide Volkswagen* that the burden on the defendant is a primary concern in determining the reasonableness of an assertion of jurisdiction.”<sup>130</sup>

Justice O’Connor insisted—correctly—that her draft accurately reflected the Court’s views, but nevertheless proposed a compromise: “I am willing to delete the quoted sentence if you would be able to concur with that portion of the opinion.”<sup>131</sup> O’Connor elaborated that, instead of including the direct quotation from *World-Wide Volkswagen* with the language to which Brennan objected, she

123. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 309 (1980)) (internal quotation marks omitted).

124. *See id.* at 6–7.

125. *Id.* at 6.

126. *Id.* at 6–7. Justice Brennan elaborated: “California’s contacts with the parties and much of the underlying transaction are attenuated: the plaintiff is not a California resident; the parties’ business relationship was formed outside the United States; and the valves were shipped from Japan to Taiwan.” *Id.* at 7 (footnote omitted). Furthermore, “[t]he uncertainty about the choice-of-law is compounded by the scanty record in this case, which does not disclose the terms of any contract that may have existed between Asahi and Cheng Shin.” *Id.*

127. *Id.*

128. *See id.* at 7–8.

129. Memorandum from Sandra Day O’Connor, Assoc. Justice, Supreme Court of the U.S., to William J. Brennan, Jr., Assoc. Justice, Supreme Court of the U.S. (Jan. 15, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

130. *Id.*

131. *Id.*

could instead insert a paragraph summarizing the fair play and substantial justice factors with a citation to the case.<sup>132</sup> In addition, she offered to delete a sentence in her draft that reiterated the point that “the burden on the defendant is a primary concern in determining the reasonableness of an assertion of jurisdiction.”<sup>133</sup>

Justice Brennan replied to Justice O’Connor on the same day.<sup>134</sup> He wrote:

Dear Sandra,

You’re right—we are not far apart, and your proposed changes would indeed go a great distance toward meeting my concerns. There is one remaining loose end, however. Your opinion makes two references to the fact that the original California plaintiff has settled with Cheng Shin . . . . As I explain in footnote 6 of my draft, I would not place any weight on this fact, because the State has an interest in avoiding the incentives such a consideration would create. If, in addition to the change you have proposed, you could also delete these two references, then I would simply drop my Part II and join your Part II-B.<sup>135</sup>

Justice O’Connor promptly responded to Justice Brennan’s note the next day and stated that she would “recirculate a draft” that would “make it possible” for him to “join Part II-B” of her decision.<sup>136</sup> Nearly a week later, after he received O’Connor’s revised draft, Brennan agreed to join Part II-B of her decision

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132. *Id.*

133. *Id.* at 1–2. Justice O’Connor’s note to Justice Brennan prompted Justice Blackmun’s law clerk to draft a brief memorandum for him which reported that “it looks as if JUSTICE BRENNAN and JUSTICE O’CONNOR will be able to iron out their differences.” Memorandum from Ellen, Law Clerk, Supreme Court of the U.S., to Harry A. Blackmun, Assoc. Justice, Supreme Court of the U.S. 1 (Jan. 15, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465). This memorandum is a separate memo from the one discussed *supra* in Part II.B.2. See *supra* note 86.

134. Memorandum from William J. Brennan, Jr., Assoc. Justice, Supreme Court of the U.S., to Sandra Day O’Connor, Assoc. Justice, Supreme Court of the U.S. (Jan. 15, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

135. *Id.*

136. Memorandum from Sandra Day O’Connor, Assoc. Justice, Supreme Court of the U.S., to William J. Brennan, Jr., Assoc. Justice, Supreme Court of the U.S. (Jan. 16, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465). Given the revisions resulting from the correspondence between Justice O’Connor and Justice Brennan, Justice Blackmun’s law clerk recommended that Blackmun join Brennan’s opinion and Parts I and II-B of O’Connor’s opinion, explaining: “That will put you on record finding minimum contacts and approving the stream of commerce test and yet, finding no jurisdiction in this case because of the need for ‘fair play.’ I see no need for you to write anything separately. Enough has been said in this case!” Memorandum from Ellen, Law Clerk, Supreme Court of the U.S., to Harry A. Blackmun, Assoc. Justice, Supreme Court of the U.S. (Jan. 20, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

without writing separately on fair play and substantial justice.<sup>137</sup> After agreeing to join this part of O'Connor's decision, Brennan had to revise his draft and circulate it accordingly.<sup>138</sup> The Justices finished their work on the case over the next month.

*C. A Brief Summary of the Justices' Final Decisions in Asahi*

The final decisions in *Asahi* were published on February 24, 1987.<sup>139</sup> To briefly summarize: the question in *Asahi* was whether the Cheng Shin Rubber Industrial Company, which manufactured tire tubes in Taiwan, could hale the Asahi Metal Industry Company, which manufactured tire tube valve assemblies in Japan, into California State Court after Cheng Shin was sued by a California resident injured in a motorcycle accident on a California highway.<sup>140</sup>

The Supreme Court divided on the standard to be applied when evaluating the exercise of personal jurisdiction over a component part manufacturer pursuant to the stream of commerce theory. Three Justices joined Part II-A of Justice O'Connor's opinion, in which she stated that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."<sup>141</sup> In O'Connor's view, *Asahi* did not have sufficient "minimum contacts" with California.<sup>142</sup>

In his concurrence, which also secured four votes, Justice Brennan advocated a less restrictive approach to establishing stream of commerce jurisdiction.<sup>143</sup> In his view, purposeful availment was satisfied "[a]s long as a participant in [the] process [from manufacture to distribution to retail sale] is aware that the product is being marketed in the forum State."<sup>144</sup> Therefore, Brennan concluded that the California Supreme Court correctly found that *Asahi* had minimum contacts with the state.<sup>145</sup>

Justice Stevens declined to join either Part II-A of O'Connor's opinion on minimum contacts or Justice Brennan's concurrence. He wrote a brief decision concurring with Parts I and II-B, and concurring in the judgment.<sup>146</sup> Stevens explained that it was not "necessary" for the Court to do "[a]n examination of minimum contacts" because analysis of "the factors set forth in *World-Wide Volkswagen*" established that "California's exercise of jurisdiction over *Asahi* in

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137. See Memorandum from William J. Brennan, Jr., Assoc. Justice, Supreme Court of the U.S., to Sandra Day O'Connor, Assoc. Justice, Supreme Court of the U.S. (Jan. 21, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465).

138. *Id.*

139. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

140. See *id.* at 105–06.

141. *Id.* at 105, 112 (O'Connor, J.).

142. *Id.* at 116.

143. See *id.* at 116–17 (Brennan, J., concurring).

144. *Id.* at 117.

145. *Id.* at 121.

146. *Id.* at 121–22 (Stevens, J., concurring).

this case would be ‘unreasonable and unfair.’”<sup>147</sup> Then, in dicta, Stevens argued that O’Connor had misapplied her more demanding test for purposeful availment to the facts because “[o]ver the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than ‘[t]he placement of a product into the stream of commerce, without more.’”<sup>148</sup>

Despite this disagreement over the minimum contacts standard, every Justice, except Justice Antonin Scalia, concluded that California’s exercise of personal jurisdiction over Asahi would violate principles of fair play and substantial justice.<sup>149</sup> And because Scalia agreed with Justice O’Connor’s holding with respect to minimum contacts and her conclusion,<sup>150</sup> Asahi prevailed in a unanimous judgment.

On February 25, 1987, the day after the Court issued its decision in *Asahi*, Justice O’Connor sent a memorandum to the conference discussing a case that had been held pending the disposition of *Asahi*.<sup>151</sup> The case, *Behning v. Camelback Ski Corp.*,<sup>152</sup> involved Maryland’s assertion of personal jurisdiction over the Pennsylvania operator of a ski resort.<sup>153</sup> As the case percolated through the Maryland courts, there was disagreement over whether the defendant could be sued in Maryland; Maryland’s highest court, the Court of Appeals, had concluded that the ski operator had not purposefully availed itself of Maryland.<sup>154</sup>

Justice O’Connor recommended that the Court grant the petition for certiorari, vacate the decision of the Maryland Court of Appeals and remand for reconsideration in light of *Asahi*.<sup>155</sup> She explained that this disposition of *Behning* was appropriate given that the “language in Part II A of the *Asahi* opinion might be read to support a finding of personal jurisdiction in this case . . . and that a majority of the Court apparently supports a *more* expansive

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147. *Id.* at 121 (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980)).

148. *Id.* at 122 (second alteration in original). Justice Stevens concluded that “[i]n most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute ‘purposeful availment’ even though the item delivered to the forum State was a standard product marketed throughout the world.” *Id.*

149. *See id.* at 105, 116 (majority opinion).

150. *See id.* at 105.

151. Memorandum from Sandra Day O’Connor, Assoc. Justice, Supreme Court of the U.S., to the Justices’ Conference (Feb. 25, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 465) [hereinafter O’Connor Conference Memo].

152. 484 A.2d 646 (Md. Ct. Spec. App. 1984), *rev’d*, 513 A.2d 874, 882 (Md. 1986), *cert. granted—vacated and remanded*, 480 U.S. 901 (1987). This case was No. 86-839 in the Supreme Court. *See Behning*, 480 U.S. at 901.

153. *See Behning*, 484 A.2d at 648–49.

154. *See Behning*, 513 A.2d at 882 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); *see also* O’Connor Conference Memo, *supra* note 151 (noting the procedural history of *Behning* and suggesting it should be remanded for reconsideration in light of the recent *Asahi* holding).

155. *See* O’Connor Conference Memo, *supra* note 151.

test for minimum contacts than was presented in Part II A.”<sup>156</sup> This discussion of the Court’s opinion in *Asahi* is notable because it shows that O’Connor understood Justice Stevens’s concurrence as a rejection of her restrictive approach to minimum contacts, meaning that her higher standard for minimum contacts received only four votes.

*D. Justice Stevens’s Concurrence in Asahi as a Common Law Decision*

Justice Stevens’s brief concurrence in *Asahi* was a paradigmatic common law decision.<sup>157</sup> His opinion was narrow and limited to the facts of the case before the Court.<sup>158</sup> As both he and Justice Brennan recognized, *Asahi* presented the “rare case[]” in which the fair play and substantial justice analysis outweighed the defendant’s minimum contacts and defeated the exercise of personal jurisdiction.<sup>159</sup> The difference between Stevens and Brennan was that the former found it unnecessary to make a determination with respect to minimum contacts<sup>160</sup> while Brennan—who consistently championed an expansive approach to personal jurisdiction<sup>161</sup>—nevertheless wrote separately on minimum contacts and articulated a competing rule to Justice O’Connor’s more demanding “something more” requirement for minimum contacts in a stream of commerce case.<sup>162</sup>

Although Justice Stevens saw no reason to establish a test for minimum contacts in *Asahi*, he nevertheless responded to Justice O’Connor’s discussion in dicta.<sup>163</sup> As noted above, Stevens suggested that even under O’Connor’s more restrictive rule for minimum contacts, *Asahi* could be found to have purposefully availed itself of the forum state.<sup>164</sup> This discussion was limited to the facts specific to *Asahi*’s conduct and is the clearest example of his common law approach to the issue of personal jurisdiction.<sup>165</sup> The discussion shows that he did not attempt to articulate a more general rule with respect to minimum contacts, but instead, limited his analysis to the facts of the case before the Court.<sup>166</sup> The next personal jurisdiction case, Stevens implied, would be decided

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156. *Id.*

157. *See* Citron, *supra* note 8, at 436.

158. *See id.*

159. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985)); *id.* at 121–22 (Stevens, J., concurring) (quoting *Burger King*, 471 U.S. at 477–78).

160. *See id.* at 121 (Stevens, J., concurring).

161. *See, e.g., Burger King*, 471 U.S. at 476 (advocating a broad test for minimum contacts based on the extent to which the defendant’s activities were “purposefully directed” toward the forum state (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75 (1984)) (internal quotation marks omitted)).

162. *See Asahi*, 480 U.S. at 117 (Brennan, J., concurring).

163. *See* Citron, *supra* note 8, at 452.

164. *See supra* note 148 and accompanying text.

165. *See* Citron, *supra* note 8, at 436, 452–53.

166. *See id.* at 448.

based upon the facts specific to that case—an approach entirely consistent with the view that a legal doctrine, such as personal jurisdiction, develops one case at a time.<sup>167</sup>

Furthermore, as Justice Stevens noted, his narrow decision in *Asahi* made solely on the basis of fair play and substantial justice was appropriate because he believed the Court should avoid making a fact specific constitutional determination with respect to minimum contacts.<sup>168</sup> *Asahi* presented a case in which Stevens believed the better course was to follow Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority* and “avoid unnecessary lawmaking.”<sup>169</sup>

Finally, Justice Stevens arrived at a fair result in *Asahi*. As noted previously in the discussion of *Burger King* and *Carnival Cruise*, fairness concerns informed Stevens's personal jurisdiction decisions.<sup>170</sup> In *Asahi*, Stevens joined Part II-B—Justice O'Connor's holding that California's exercise of jurisdiction over *Asahi* violated principles of fair play and substantial justice.<sup>171</sup> He did not discuss fairness further. That may be because *Asahi* and Cheng Shin were foreign corporations that stood on equal footing in their dealings, and therefore, *Asahi* did not present a case in which a more powerful and sophisticated party took advantage of a less sophisticated party. Furthermore, because *Asahi* and Cheng Shin were foreign parties, there was nothing unfair about denying Cheng Shin the ability to sue *Asahi* in a California court. Although concern for a fair result may not have animated his concurrence, Stevens nevertheless reached a fair result based on the facts of the case.

#### IV. IMAGINING JUSTICE STEVENS'S DISSSENT IN *MCINTYRE*

##### A. *The Opinions in McIntyre*

As noted in the preceding part, Justice Stevens declined to address the standard for minimum contacts in *Asahi*.<sup>172</sup> Had he still been on the Court for the 2010–11 Term when *McIntyre* was argued and decided, Stevens would have been required to make a minimum contacts determination. *McIntyre* involved a claim by a man in New Jersey who injured himself there while using a metal shearing machine manufactured by a British company.<sup>173</sup> The issue specifically raised by the case was whether the British manufacturer had minimum contacts in—or more precisely, whether it had availed itself of—the state of New Jersey

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167. See *id.* at 436–37 (citing Popkin, *supra* note 17).

168. See *Asahi*, 480 U.S. at 122 (Stevens, J., concurring).

169. Stevens, *supra* note 21, at 180 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring)).

170. See *supra* text accompanying notes 38, 44.

171. See *Asahi*, 480 U.S. at 116 (majority opinion); *id.* at 122 (Stevens, J., concurring).

172. See *supra* text accompanying notes 146–148.

173. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

when the company sold its machines in the United States through a U.S. distributor and sold no more than four of its machines in New Jersey.<sup>174</sup> The case presented a straightforward question about the exercise of stream of commerce jurisdiction.

As the three opinions in *McIntyre* demonstrate, Justice Stevens would have been able to choose from three different approaches. He could have provided Justice Anthony Kennedy with a fifth vote by now adopting Justice O'Connor's something more standard for stream of commerce jurisdiction.<sup>175</sup> Given Stevens's refusal to join O'Connor's opinion in *Asahi* with respect to minimum contacts more than two decades ago, there is no reason to believe that he would have joined Kennedy's plurality decision in *McIntyre*.

What about the brief concurring opinion by Justice Stephen Breyer and joined by Justice Samuel Alito?<sup>176</sup> Breyer wrote a very narrow decision that hewed closely to the facts of *McIntyre* and declined to articulate a new rule.<sup>177</sup> According to Breyer, New Jersey did not have personal jurisdiction over the British manufacturer because "[n]one of [the Court's] precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, [primarily the use of an independent distributor in the United States,] is sufficient" to support the exercise of jurisdiction.<sup>178</sup> Although Breyer's concurrence seems to resemble an opinion by Stevens in its narrow approach and reluctance to create a new rule, I believe that Breyer's opinion rests upon a misreading of the Court's prior precedents. Therefore, I believe that Stevens would not have joined Breyer's concurrence.

This leaves Justice Ginsburg's dissent, which was joined by two other Justices, including Justice Stevens's replacement, Justice Elena Kagan.<sup>179</sup> Ginsburg's dissent is the longest of the three opinions and contains a detailed discussion of the facts, a cogent summary of the governing jurisdictional rules and cases, and a straightforward application of those rules to the facts. I believe that with his common law approach to deciding cases, Stevens would have joined this dissent.

#### *B. How Justice Stevens Would Have Reached His Decision in McIntyre*

In order to arrive at a decision in *McIntyre*, I believe that Justice Stevens would have applied the factors he set out in his *Asahi* concurrence. Whether J. McIntyre Machinery's conduct rose "to the level of purposeful availment" in New Jersey would require "a constitutional determination that is affected by the volume, the value, and the hazardous character of" the machine(s) sold by the

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174. *See id.*

175. *See id.* at 2788–89 (citing *Asahi*, 480 U.S. at 112).

176. *See id.* at 2791 (Breyer, J., concurring).

177. *See id.*

178. *Id.* at 2791–92.

179. *See id.* at 2794 (Ginsburg, J., dissenting).



company.<sup>180</sup> The quotation in the preceding sentence replaces the term “components” from *Asahi* with the phrase “machine(s) sold by the company.” That is because J. McIntyre was not selling components but rather a finished product, albeit through the use of a distributor.<sup>181</sup> This difference from *Asahi* supports the exercise of jurisdiction because J. McIntyre had control over whether to attempt to sell, or not sell, its products in New Jersey.<sup>182</sup> Furthermore, although the volume of sales to New Jersey was low, the machines had a high value and certainly were hazardous.<sup>183</sup> A single machine cost about \$25,000 and could inflict a serious injury on a user if it malfunctioned.<sup>184</sup> Even if there was just a single sale of the metal shearing machine in New Jersey, Justice Stevens would have concluded that this sale would support the exercise of specific jurisdiction.

This argument is supported by Justices Stevens’s concurrence in *Shaffer*, in which he concluded that an individual’s purchase of stock of a U.S. company on the open market did not provide “fair notice” to individuals that they were availing themselves of the state of the company’s incorporation.<sup>185</sup> The facts in *McIntyre* with respect to fair notice were very different. J. McIntyre Machinery was a manufacturer with the power and authority to decide how—and where—to sell its products in the United States.<sup>186</sup> Furthermore, although the company had only limited sales in New Jersey, it nevertheless attempted to sell its machines “anywhere in the United States,” including the state of New Jersey.<sup>187</sup> Justice Stevens, therefore, would likely have argued that the company’s sales and marketing efforts gave it fair notice that it could be sued in a state where its machine injured someone.<sup>188</sup>

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180. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring).

181. See *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion).

182. See *id.* (“[T]he U.S. distributor ‘structured [its] advertising and sales efforts in accordance with’ J. McIntyre’s ‘direction and guidance whenever possible.’” (quoting *Nicastro v. McIntyre Mach. Am.*, 987 A.2d 575, 579 (2010))).

183. See *id.* (noting that “no more than four machines . . . ended up in New Jersey”); *id.* at 2795 (Ginsburg, J., dissenting) (“The machine that injured *Nicastro* . . . sold in the United States for \$24,900 in 1995, and features a ‘massive cutting capacity.’” (citation omitted)).

184. See *id.* at 2795 (Ginsburg, J., dissenting).

185. See *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

186. See *J. McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

187. See *id.* at 2796.

188. Justice Stevens joined the Court’s opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 286 (1980). It would have been consistent for him to vote with the majority in *World-Wide Volkswagen* and dissent in *McIntyre*. In *World-Wide Volkswagen*, the Court held that the regional distributor and retail seller of the automobile did not avail themselves of Oklahoma, where the accident occurred and the plaintiffs brought suit. *Id.* at 295. The Court did not address whether there was personal jurisdiction over the foreign manufacturer, which did not object to the exercise of personal jurisdiction. See *id.* at 288 n.3. Furthermore, as Justice Ginsburg noted, “the Court said in *World-Wide Volkswagen* that, when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable ‘to subject it to suit in [any] of those States if its allegedly defective [product] has there been the source of the injury.’” *J. McIntyre*, 131 S. Ct. at

Finally, Justice Stevens's dissents in *Burger King* and *Carnival Cruise* support the conclusion that he would have dissented in *McIntyre*. In those cases, Stevens dissented because of his concern that the exercise of jurisdiction—upheld by the Court in each case—would be unfair.<sup>189</sup> In both *Burger King* and *Carnival Cruise*, an individual was required to litigate in an inconvenient forum chosen by its more powerful corporate adversary.<sup>190</sup> In each case, Stevens's attack on jurisdiction was bolstered by his reliance on contract law doctrine that enabled him to consider the relative strength and sophistication of the parties to the dispute.<sup>191</sup> Although *McIntyre* was not a contract case, I nevertheless believe that Stevens's sensitivity to arriving at a fair result would have led him to uphold New Jersey's exercise of jurisdiction over the British manufacturer because New Jersey was where the incident giving rise to the lawsuit occurred and it would have allowed the injured plaintiff, an individual, to maintain his lawsuit in a convenient forum.

In the final section of this Part, I provide a draft dissent by Justice Stevens. I believe he certainly would have joined Justice Ginsburg's dissent. I also believe that he would have drafted a brief dissent summarizing the reasons for his decision, as he did in *Asahi*, *Burger King*, and *Burnham*.<sup>192</sup>

### C. A Draft of Justice Stevens's Separate Dissent in *McIntyre*

JUSTICE STEVENS, dissenting.

The respondent was injured in New Jersey while using a metal-shearing machine manufactured by the petitioner, a British corporation that hired an Ohio company to sell its products throughout the United States. The respondent filed suit against petitioner in the State where his injury occurred, claiming that the machine was a dangerous product defectively designed. In this case involving a tort, there was "contact" between the respondent and the petitioner through the

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2802 (Ginsburg, J., dissenting) (quoting *World-Wide Volkswagen*, 444 U.S. at 297). Stevens's dissent in *McIntyre*, therefore, would have followed from his vote in *World-Wide Volkswagen*.

189. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 597 (1991) (Stevens, J., dissenting); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (Stevens, J., dissenting).

190. See *Carnival Cruise*, 499 U.S. at 587, 595, 597 (upholding a forum selection clause requiring litigation in Florida where the clause was located on tickets issued by Carnival Cruise Lines to customers in Washington state); *Burger King*, 471 U.S. at 463, 487 (citing FLA. STAT. ANN. § 48.193(1)(g) (West 2006)) (upholding jurisdiction in Florida over a defendant based in Michigan).

191. See, e.g., *Carnival Cruise*, 499 U.S. at 600–01, (Stevens, J., dissenting) (discussing the adhesive nature of a forum selection clause in a consumer contract and indicating it may be void as against public policy); *Burger King*, 471 U.S. at 489–90 (Stevens, J., dissenting) ("The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. . . . There is no indication that [the defendant] had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit in Florida." (quoting *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1512–13 (11th Cir. 1984), *rev'd and remanded sub nom. Burger King*, 471 U.S. 462) (internal quotation marks omitted)).

192. *Burnham v. Superior Court*, 495 U.S. 604, 640 (1990) (Stevens, J., concurring).

accident in which the respondent was injured. It was reasonable for the respondent to bring suit in the State where he claims to have been injured by the petitioner's product. However, the Court has decided that the respondent may not sue the petitioner in New Jersey, but must instead find another forum—presumably Great Britain, where petitioner is incorporated. *Ante*, at 2791 (plurality opinion). This decision is neither supported by the law nor fair on the facts.

JUSTICE KENNEDY's plurality decision and JUSTICE BREYER'S concurrence rest upon two facts with respect to "purposeful availment": that the respondent's employer purchased the machine from the petitioner's exclusive distributor in the United States, and that the petitioner sold no more than four of its machines in New Jersey. *Ante*, at 2786 (plurality opinion); *ante*, at 2791–92 (BREYER, J., concurring). But these facts show that the petitioner purposefully availed itself of the forum State. In *Asahi Metal Industry Co. v. Superior Court*, I declined to make a constitutional determination with respect to "minimum contacts." *See* 480 U.S. 102, 121 (1987) (STEVENS, J., concurring). The Court now must make such a determination, and I agree with JUSTICE GINSBURG that the facts here establish that McIntyre UK purposefully availed itself of and therefore had minimum contacts with New Jersey. *See ante*, at 2801, 2804 (GINSBURG, J., dissenting). Although the company had a small volume of sales in the forum State—perhaps no more than one—it nevertheless employed a distributor to sell its metal-shearing machines throughout the United States, including the State of New Jersey. The machine that is alleged to have injured the plaintiff sold for approximately \$25,000. McIntyre UK had fair notice that its efforts to sell such a large, potentially hazardous product in the United States could lead to the company being sued in the State where the machine may have injured someone. *See Shaffer v. Heitner*, 433 U.S. 186, 218 (STEVENS, J., concurring).

Neither *World-Wide Volkswagen*, 444 U.S. 286 (1980), nor *Asahi*, relied on by JUSTICE BREYER, support reversal of the judgment of the New Jersey Supreme Court. In *World-Wide Volkswagen*, the Court held that the regional distributor and the seller of the car could not be sued in Oklahoma because they did not attempt to sell cars or otherwise conduct business in that State. *See World-Wide Volkswagen*, 448 U.S. at 298–99. Similarly, in *Asahi*, the defendant challenging the exercise of jurisdiction was a component manufacturer and not the manufacturer of the product—the motorcycle tire tube—that allegedly malfunctioned. *See Asahi*, 480 U.S. 102, 106 (1986). Here, McIntyre UK controlled the efforts to sell its machines and made no attempt to structure the efforts of its distributor to avoid sales into New Jersey. *See World-Wide Volkswagen*, 444 U.S. at 297 ("[I]f the sale of a product . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States . . .").

Finally, as JUSTICE GINSBURG explains, fairness concerns make it eminently reasonable to permit the plaintiff to hale McIntyre UK into New

Jersey. *Ante*, at 2801–02 (GINSBURG, J., dissenting). To hold otherwise would require the plaintiff, an individual, to assume the cost of traveling from where the injury occurred to an inconvenient forum.

## V. CONCLUSION

Justice Stevens prevented the Supreme Court from articulating a minimum contacts rule for stream of commerce cases in *Asahi*, and his retirement apparently prompted the Court to attempt to articulate such a rule in *McIntyre*. What is most notable about the Court's failure to agree on a rule for stream of commerce jurisdiction in *McIntyre* is the even greater divergence between three opinions in *McIntyre* compared to the different approaches in *Asahi*. In *Asahi*, Justice O'Connor and Justice Brennan merely disagreed on the standard necessary to establish minimum contacts in a stream of commerce case—and Stevens refused to resolve that disagreement because of his belief that it was not necessary to address the issue of minimum contacts.

*McIntyre* reveals a far more divided Court with respect to the issue of specific jurisdiction. Justice Kennedy's decision not only endorses the higher "something more" standard articulated by O'Connor,<sup>193</sup> it also embraces notions of consent and state sovereignty believed to have been abandoned by the Court after *International Shoe*.<sup>194</sup> Justice Breyer's concurrence amounts to an exercise of what Professor Bickel described as the "passive virtues."<sup>195</sup> However, in deciding *McIntyre* as narrowly as possible in order to leave the issue of personal jurisdiction for the next case, Breyer's reading of *World-Wide Volkswagen* and *Asahi* was myopic. Justice Ginsburg reached the correct result for the right reasons in her dissent and would have received the vote of Stevens had he still been on the Court. This would not, however, have changed the outcome, as only two other Justices—including Stevens's replacement, Justice Kagan—joined Ginsburg's dissent.

This Article has argued that with his common law approach to judging, Justice Stevens would have dissented in *McIntyre*. It is worth noting that, because the Court's decision in *McIntyre* was splintered, the Court likely will be asked to grant certiorari in another personal jurisdiction case in order to provide more guidance in this area of the law. Were he still a Justice, Stevens would decide the next case—the case after *McIntyre*—based upon its specific facts.

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193. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788–89 (plurality opinion) (quoting *Asahi*, 480 U.S. at 112 (O'Connor, J.)).

194. See *id.* at 2798 (Ginsburg, J., dissenting); see also *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1333 n.98 (1983) ("Sixty years later, however, the Court, in *International Shoe Co. v. Washington* abandoned the language of territoriality and sovereignty . . . ." (citation omitted) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945))).

195. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (1962) (discussing what he phrased "the passive virtues" and their relationship to jurisprudential philosophy).

Just as likely, surveying the path from *Asahi* to *McIntyre*, Stevens would vote to deny certiorari in the case and allow the lower courts to develop their rules—as they did during the more than two decades between *Asahi* and *McIntyre*.